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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

THE PEOPLE,

Plaintiff and Respondent,

v.

SHAWN ANTHONY WYNN JR.,

Defendant and Appellant.

D076568

(Super. Ct. No. INF1401863)

APPEAL from a judgment of the Superior Court of Riverside County,
John G. Evans, Judge. Affirmed and remanded with directions.

Jill M. Klein, under appointment by the Court of Appeal, for Defendant
and Appellant.

Xavier Becerra, Attorney General, Lance E. Winters, Chief Assistant
Attorney General, Julie L. Garland, Assistant Attorney General, Melissa
Mandel and Stephanie H. Chow, Deputy Attorneys General, for Plaintiff and
Respondent.

In March 2017, a jury convicted Shawn Anthony Wynn, Jr., of first degree murder (Pen. Code,¹ § 187, subd. (a)) and found true a special circumstance allegation that the murder was gang related (§ 190.2, subd. (a)(22); count 1). The jury also found Wynn guilty of active participation in a criminal street gang (§ 186.22, subd. (a); count 2) and being a felon in possession of a firearm (§ 29800, subd. (a)(1); count 3). The jury also found true the allegation Wynn personally and intentionally discharged a firearm (§ 12022.53, subd. (d)). The court found true an alleged strike prior (§ 667, subds. (b)-(i)), and a serious felony prior (§ 667, subd. (a)(1)).

Wynn was sentenced to life without parole for the murder conviction plus 25 years to life for the firearm enhancement. The court also imposed a consecutive determinate sentence of nine years, including five years for the serious felony prior.

On appeal, this court affirmed the convictions and the true findings on the enhancements. We ordered the sentence on count 3 to be stayed under section 654. We remanded the case to permit the trial court to exercise newly acquired discretion to consider striking the firearm enhancement and the serious felony prior. (*People v. Wynn* (Dec. 18, 2018, D074580) [nonpub. opn.])

On remand, the trial court appointed counsel and held a hearing, following which the court determined the interest of justice would not be served by striking or modifying the firearm enhancement or by striking the prior. The court ordered the sentence on count 3 to be stayed under section 654 and otherwise reaffirmed the original sentence.

Wynn appeals raising a number of arguments that were never presented to the trial court. At base, the contention is that the trial court

¹ All further statutory references are to the Penal Code.

abused its discretion for not articulating reasons for rejecting arguments that were never made at the sentencing hearing. Wynn also contends, and the People agree, that the abstract of judgment must be amended to reflect the actual days of custody as of the date of the current sentencing.

We will reject Wynn's abuse of discretion argument and affirm the trial court's decision. We will remand the case to permit the trial court to amend the abstract of judgment to reflect the correct number of days in custody as of the sentencing date.

STATEMENT OF FACTS

The facts of the offense are fully set forth in our prior opinion. We will not repeat them here. (*People v. Wynn, supra*, D074580.)

DISCUSSION

Wynn contends the court abused its discretion because the trial court failed to specifically address what appellate counsel now contends were mitigating factors and those factors essentially mandated the court to strike the prior and the enhancement. Forgetting that none of these issues were raised in the trial court and that trial counsel limited argument to his perception of what the facts of the offense showed, counsel provides a list of failures the court allegedly made.

First, counsel contends the court erred in relying on the facts of the offense. Next, the court should have ordered a supplemental probation report, although not requested or required. Counsel also argues the court should have considered Wynn's age at the time of the crime, 21 years old, as a mitigating factor, which was not argued and that Wynn's criminal history of robbery, several misdemeanors, and several cases pending at the time of his original sentencing was insignificant and justifies granting relief. Perhaps

most remarkably, counsel argues the alleged abuse of discretion amounts to a denial of due process.²

As we will discuss, the burden is on the appellant to not merely disagree with the court’s sentencing decision, but to show the decision is arbitrary, that no reasonable judge would have reached that decision. Appellant’s submission in this case falls woefully short of meeting the burden.

A. Legal Principles

We review a trial court’s decision on a motion to strike in the furtherance of justice (§ 1385) under the abuse of discretion standard of review. Under that standard, the burden is on the challenging party to show the decision was an abuse of the court’s authority. (*People v. Carmony* (2004) 33 Cal.4th 367, 373.) To meet that burden, the person must clearly show “that the sentencing decision was irrational and arbitrary.” (*Id.* at p. 376.) It is not enough to show that reasonable judges might have reached a different result. (*People v. Willover* (2016) 248 Cal.App.4th 302, 323.)

When a court considers a motion to strike a firearm enhancement such as the one here, the court must consider essentially the same actors as it would use in an original sentencing decision. (*People v. Pearson* (2019) 38 Cal.App.5th 112, 117.) Our usual presumption in reviewing a trial court’s judgment is that the judge correctly applied the law unless the record demonstrates the contrary. (*People v. Morrison* (2019) 34 Cal.App.5th 217,

² We will not pause with the due process argument except to note several facts. The enhancement and prior were properly charged, found true and upheld on appeal. Wynn was given retroactive access to new statutes that broadened trial court discretion. He was present, represented by counsel, and had a full opportunity for a hearing to present his point of view. That the court exercised its discretion differently than counsel now wishes does not even approach a due process violation.

225.) Trial judges are not required to specifically discuss every possible sentencing factor, particularly where there has been no argument regarding any of those factors. (Cf. *People v. Carpenter* (1999) 21 Cal.4th 1016, 1046.)

Where the court conducts a resentencing hearing and the defendant is not eligible for probation and makes no request, a supplemental probation report is not required, and the court does not err in failing to request such report on the court's own motion. (*People v. Bullock* (1994) 26 Cal.App.4th 985, 990.)

B. Analysis

The trial judge, who also presided over the original trial was fully aware of his discretion to strike or modify the firearm enhancement and of his discretion to strike the prior in the furtherance of justice. The court reviewed the trial proceedings and his notes and was fully informed of the prior proceedings and materials. Defense counsel did not address any facts relating to Wynn's background, criminal history, age, or the apparent fact that over the two and a half years in prison Wynn may have made some effort to begin study for his G.E.D. Instead, counsel focused solely on what counsel perceived as Wynn's minimal role in the crime. Although counsel admitted Wynn pulled the trigger, he was really under the significant influence of others, and, therefore, it would be in the furtherance of justice to strike the enhancement and prior.

Responding to the defense argument, the court rejected counsel's mitigating version of the facts, which the court found unjustified by the record. Responding to counsel's only argument does not even hint that the court was ignorant of either Wynn's background or circumstances. Indeed, the trial judge had previously reviewed the probation officer's report at sentencing. That report does not provide a basis to argue the court abused its

discretion. We presume the court was aware of the law and it expressly acknowledged its authority to strike the enhancement and prior in the furtherance of justice. The court's finding justice would not be served by granting relief in this case is not arbitrary or irrational. This record demonstrates the decision was well within the broad discretion afforded to sentencing judges.

C. Abstract of Judgment

The parties correctly agree the trial court had an obligation at the resentencing hearing to determine the number of days of actual custody at that point and to include that information in the abstract of judgment.

(*People v. Buckhalter* (2001) 26 Cal.4th 20, 40-42.)

DISPOSITION

The case is remanded to the trial court with directions to calculate Wynn's actual custody days as of the time of the resentencing and to amend the abstract accordingly. The court shall forward the amended abstract to the Department of Corrections and Rehabilitation. In all other respects, the judgment is affirmed.

HUFFMAN, Acting P. J.

WE CONCUR:

HALLER, J.

AARON, J.